Filed 7/3/19 In re K.T. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.T., a Person Coming Under the Juvenile Court Law.	
SONOMA COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. FRANK T., Defendant and Appellant.	A155318 (Sonoma County Super. Ct. No. DEP-5273-01)

Frank T. (father), the father of one-year-old K.T., challenges the juvenile court's order terminating his parental rights under Welfare and Institutions Code section 366.26.[1] Father, who was incarcerated throughout the proceedings below, contends that reversal is required because the juvenile court (1) proceeded with the selection-and-implementation hearing under section 366.26 in his absence and (2) abused its discretion by denying his request for a continuance to enable him to attend the hearing. We affirm.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

I.
FACTUAL AND PROCEDURAL BACKGROUND

K.T. was detained after she was born several weeks premature and tested positive for methamphetamine. Her mother, E.G. (mother), admitted to smoking the drug throughout the pregnancy.[2] Mother also reported that she and father smoked heroin together "a few times" while she was pregnant. At the time of K.T.'s birth in August 2017, father, who has an extensive criminal record, was in jail in Marin County.

Later that month, the Sonoma County Human Services Department (Department) filed a juvenile dependency petition for K.T., alleging jurisdiction under section 300, subdivision (b) (failure to protect) based on the parents' substance abuse and father's criminal history and under subdivision (j) (abuse of sibling) based on a maternal half-sibling's dependency case. K.T. was eventually discharged from the neonatal intensive care unit and placed in a foster home.

In January 2018, father, now incarcerated at San Quentin State Prison, participated in the combined jurisdictional/dispositional hearing by telephone. After declaring father to be K.T.'s presumed father, the juvenile court found the petition's allegations true, bypassed reunification services to both parents, and scheduled a hearing under section 366.26 for May 2018.

At the May 2018 hearing, father's new counsel, who was appearing in the case for the first time, requested a continuance because she had been unable to secure her client's appearance by telephone. She had not yet prepared a form JV-450 (Order for Prisoner's Appearance at Hearing Affecting Parental Rights) or a form JV-451 (Prisoner's Statement Regarding Appearance at Hearing Affecting Parental Rights), noting that although these documents "are normally submitted by the social worker with her notice to the parents of setting the [section 366.26] hearing, . . . that . . . is not the practice for this county." The Department's counsel confirmed that "it's in the local rules that the

[2] Mother is not a party to this appeal, and we do not discuss facts relating to her except to provide context.

counsel for the prisoner needs to do that," and the juvenile court continued the hearing to mid-July.

At the July 2018 hearing, father's counsel requested another continuance to secure her client's presence, explaining:

> "My client remains incarcerated. I had filed a prisoner transport order and I never received anything back from the state prison. To my knowledge it was filed properly and there was sufficient time. So I'm not sure what happened with that; if my client declined to be transported or if he wished to participate by phone, and that has not been provided to him.
>
> "I did receive a letter from [father] indicating that he is opposed to termination of parental rights and he does want to work with me to do what he can to prevent that."

The Department's counsel objected to a continuance, and the juvenile court responded, "You know, if there wasn't government action preventing his appearance, there would be no question, but as the executive branch which [you are] a part of is preventing his appearance here today and thwarting his right to due process, that won't look good at the [F]irst [District Court of Appeal]." The Department's counsel stated it was unclear father had "actually expressed a desire to be present," which she characterized as "a prerequisite to the transport order." Father's counsel reiterated that father had "expressed a desire to participate in the case[,] . . . and it seemed clear that he would like to participate however possible, whether that is physical presence or participating by telephone. And it's not clear that either opportunity has been afforded to him." After the Department's counsel emphasized that father had never had contact with K.T. and was able to appear at the jurisdictional/dispositional hearing, the court denied the request for a continuance without further explanation.

When the juvenile court asked whether father had evidence to submit, his counsel responded that the only communication she had been able to have with him was a single letter he sent her, and she renewed her objection to "the court moving forward today knowing he did wish to be present." The Department's counsel responded that "the [F]irst [D]istrict . . . [is] aware of the short distance between Santa Rosa and San

Quentin," and there were "other means of communication than waiting for letters to come in. If there's any absence of direction from . . . father, I don't think that that should be held against the minor and further delay . . . permanency for this child." Father's counsel responded that although father was back at San Quentin, "there was an interim period where he was transferred to Susanville which made it rather difficult to make arrangements to contact him."[3] Without addressing the issue again, the court terminated father's and mother's parental rights and ordered adoption as K.T.'s permanent plan.

II.
DISCUSSION

A. Father's Involuntary Absence from the Section 366.26 Hearing Does Not Require Reversal.

Father claims that the order terminating parental rights must be reversed because his right to be present at the section 366.26 hearing was violated. We agree that error occurred, but we conclude it was harmless.

Penal Code section 2625 (section 2625) provides that in dependency cases involving the child of an incarcerated parent, "[u]pon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. No proceeding may be held under . . . Section 366.26 . . . without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by [a representative of the institution] . . . stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding." (§ 2625, subds. (a), (b) & (d).) Although this language requires the presence "of the prisoner *or* the prisoner's attorney," our state Supreme Court has interpreted the statute to require that "the prisoner

[3] In early April and mid-June 2018 respectively, notices of the originally scheduled section 366.26 hearing and the continued hearing were served by mail on father at Susanville State Prison.

either . . . be present or . . . have executed a waiver of his or her appearance," in light of the clear legislative intent to ensure that prisoners have notice and the opportunity to attend certain dependency hearings affecting their children. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 623–624.) In other words, the presence of the prisoner's attorney alone does not suffice unless the prisoner has validly waived his or her right to be present.[4]

California Rules of Court, rule 5.530(f), which implements section 2625, directs juvenile courts to develop "[l]ocal procedures or protocols to ensure an incarcerated parent's notification of, transportation to, and physical presence at court hearings involving proceedings affecting his or her child as required or authorized by . . . section 2625 and this rule unless he or she has knowingly waived the right to be physically present." (Cal. Rules of Court, rule 5.530(f)(7)(A).) In turn, Sonoma County Superior Court Local Rule 10.30 (Local Rule 10.30) provides that before any hearing at which an incarcerated parent "has a right to appear, 1.) it is the responsibility of the [parent's] attorney to arrange for the transportation of the client to appear at the hearing[] and/or 2.) obtain a waiver from the client." Specifically, in the case of a parent incarcerated in state prison, the parent's counsel must, "[a]t least . . . three (3) weeks prior to the scheduled hearing date, submit to the [juvenile] court [form JV-450] and [a] Declaration in Support of the Order." (Local Rule 10.30(B)(1).) Upon obtaining certified copies of the order, counsel must file a proof of service showing they have been delivered to the court, the parties, and the facility where the parent is held. (Local Rule 10.30(B)(2), (C).) Finally, "[i]f the parent does not wish to attend the hearing," his or her counsel has the "responsibility to obtain the [proper waiver form] from the parent and/or facility and file it prior to the hearing." (Local Rule 10.30(D).)

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[4] Under section 2625, subdivision (g), a prisoner "who has either waived his or her right to physical presence at the hearing pursuant to subdivision (d) or who has not been ordered before the court may, at the court's discretion, in order to facilitate the parent's participation, be given the opportunity to participate in the hearing by videoconference" or teleconference, although "physical attendance by the parent at the hearings is preferred."

The Department argues that the juvenile court did not violate section 2625, subdivision (b)—even though it proceeded with the section 366.26 hearing "without either a signed waiver of [father's] appearance or an affidavit from the warden that [father] refused transport"—because "there was no evidence that [father] wanted to be transported to the hearing." Relying on Local Rule 10.30, it argues that father's counsel "was responsible for ascertaining his wishes about whether he wanted to be transported to the hearing and arranging his transport or securing his waiver. [Counsel] represented that [father] wanted to participate in the case, but that did not mean that he wanted to be transported to the hearing at which his parental rights would likely be terminated."

The record contains a form JV-450 signed by the juvenile court and an unsigned form JV-451, both of which were filed on the same day as the continued May 2018 hearing. But it does not contain any proof of service, as required under Local Rule 10.30(C), to show that the forms were actually delivered to San Quentin. Even assuming that father's counsel below did not fully comply with her responsibilities under this rule, however, section 2625, subdivision (d) provides that a court *cannot* proceed with a section 366.26 hearing in the prisoner's absence unless the court has a waiver signed by the prisoner or an affidavit signed by a custodial official. (§ 2625, subd. (d); Cal. Rules of Court, rule 5.530(f)(4).) Thus, it is of no moment that father's desire to attend the hearing may have been ambiguous, though we note that there was at least enough evidence of that desire for the court to sign the transport order. (See § 2625, subd. (d) [court's duty to issue transport order triggered by "statement from the prisoner or his or her attorney indicating the prisoner's desire to be present"; but see Cal. Rules of Court, rule 5.530(f)(2) [court "must" issue transport order before any hearing under section 366.26].) Regardless of who is to blame for the failure to secure father's attendance at the hearing, the court erred by proceeding without documentary evidence that father wished to waive his right to be present.

Although we are troubled that the section 366.26 hearing proceeded in father's absence, we must conclude that the error was harmless. In *Jesusa V.*, the Supreme Court held that the violation of a parent's rights under section 2625 is subject to state harmless-

error analysis, rejecting the argument that such errors are reversible per se. (*In re Jesusa V.*, *supra*, 32 Cal.4th at pp. 624–625.) Though the Court recognized the legislative intent to afford incarcerated parents the right to be present at certain dependency hearings, it observed that there was also a "strong countervailing interest, expressed by the Legislature itself, that dependency actions be resolved expeditiously. [Citations.] That goal would be thwarted if the proceeding had to be redone without any showing the new proceeding would have a different outcome." (*Id.* at p. 625.) As a result, an incarcerated parent's involuntary absence from a section 366.26 hearing in violation of section 2625 does not require reversal unless it is reasonably probable the result would have been more favorable to the parent had he or she attended. (*Jesusa V.*, at p. 625; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Father argues that his absence from the section 366.26 hearing was prejudicial because it was one of only two opportunities he had to participate in the case and "provide information to the juvenile court [and] . . . make his . . . wishes known." He states that had he appeared at the hearing, "he would have been able to meet personally with his attorney prior to the hearing. He would have been able to review the section 366.26 report . . . with the assistance of counsel prior to the hearing . . . and . . . offer information about family members or otherwise raise his concerns." Although we appreciate father's desire to participate in the hearing, he fails to demonstrate that his input could have changed the result. In other words, he has failed to establish prejudice because he has not articulated compelling reasons, based on facts, why the permanent plan was not in K.T.'s best interests. Where a child is adoptable, as K.T. undisputedly is, "the court *must* order adoption and its necessary consequence, termination of parental rights, unless one of the [exceptions under section 366.26, subdivision (c)(1)(B)] provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.* (2003) 31 Cal.4th 45, 53, italics added.) It is clear that none of the exceptions, which arise only "in *exceptional circumstances*," apply here (*ibid.*), and father does not argue otherwise.

Recognizing that "it may be difficult to determine how [he] could have effectively contributed to the section 366.26 hearing," father also contends that "[a]pplication of the harmless error rule under the circumstances of this case serves to eviscerate the legislative intent and the statutory mandate behind . . . section 2625 and manifestly excuses both the custodial officials and the juvenile court for their mutual indifference to [his] rights." He claims that "depriving [him] of his singular right to be present at the termination hearing undermined the integrity and fundamental fairness of the proceedings." But any due-process violation resulting from father's involuntary absence "would not per se warrant a reversal." (*In re Iris R.* (2005) 131 Cal.App.4th 337, 343.) Even under the stricter federal standard for assessing prejudice, we have no trouble concluding that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Iris R.*, at p. 343.)

B. The Juvenile Court Did Not Err by Denying Father's Request for a Continuance.

Father also claims that the trial court abused its discretion by denying another continuance to permit him to attend the section 366.26 hearing. We are not persuaded.

A juvenile court may continue any hearing "upon a showing of good cause," but only if doing so is not "contrary to the interest of the minor." (§ 352, subd. (a)(1) & (2).) "In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (§ 352, subd. (a)(1).) "Courts have interpreted this policy to be an express discouragement of continuances" in the dependency context, and the "denial of a request for a continuance will not be overturned on appeal absent an abuse of discretion." (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.)

Father argues that he established good cause for a continuance because "inexplicably, custodial authorities [did] not transport[] [him]" for the section 366.26 hearing. As we have suggested, it is hardly clear that the fault for father's absence lies with San Quentin officials, because our record does not demonstrate that the relevant

forms were ever delivered to the appropriate parties. And even assuming that father had good cause to request a continuance, we cannot agree that "[t]here was no showing that [a] short continuance would have been contrary to the interests of the minor." The case had already been continued to secure father's presence. As he says, K.T. "was living with her prospective adoptive parents in a stable placement," but "time is of the essence" in reaching a permanent plan, particularly for children as young as she. (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 847 & fn. 4; *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1187.) Moreover, as discussed above, father has failed to demonstrate that " 'a different result would have occurred had [he] been present.' " (*In re Z.S.* (2015) 235 Cal.App.4th 754, 773.) Thus, even if the juvenile court had erred by denying his request for a continuance, the error was harmless under both the state and federal standards. (*Chapman v. California*, *supra*, 386 U.S. at p. 24*; People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

III.
DISPOSITION

The order terminating parental rights is affirmed.

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Humes, P.J.

WE CONCUR:

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Banke, J.

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Sanchez, J.